COPY

IN THE CIRCUIT COURT FOR THE FIFTEENTH JUDICIAL CIRCUIT
OGLE COUNTY, ILLINOIS

People of the State of Illinois,
Plaintiff,

vs.

New Landing Utility, Inc., an Illinois corporation, Gene Armstrong, individually and as President of New Landing Utility, Inc.
Defendants.

No. 00 CH 97

FILED

MAY 4 2004

CLERK OF THE CIRCUIT COURT
OGLE COUNTY

**DEFENDANTS' WRITTEN SUMMATION**

*Preface*

The Court's careful attention to this case is greatly appreciated by the Defendants.

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*Applicable Law: Standards and Guidelines*

The following are some of the legal standards and guidelines the Court should use.

1. This is an enforcement action. Defendants suggest that one of the primary purposes of enforcement is to achieve compliance.

2. Plaintiffs cite no case that imposes liability upon an individual for violations committed by a corporation. All the cases they cite are cases where an individual officer whose actions constitute the corporation's violation was held personally liable, along with the corporation. And all of those cases are cases where the violations involve pollution.

3. Except as provided in Section 43(a) of the Act (415 ILCS 43(a)), the EPA has no basis in law to request an affirmative injunction, and that Section may be employed only to abate pollution *People v Agpro, Inc.*, 345 Ill.App.3d 1011 (2d Dist., 2004). The Court should not enter an injunction where the injunctive relief requested is moot (*i.e.*, to compel what has already been done, or is already being done.)

4. Monetary penalty ought to bear some relationship to the gravity of the violation in respect to the environmental harm caused. If the harm is great, the penalty should be sufficient (a) to appropriately penalize whoever caused the environmental harm and, (b) to deter others who might otherwise be inclined to commit a similar violation. It is inappropriate to treat every violation of every EPA regulation as if it caused pollution or harm to the environment. Penalties for violations that cause no environment harm should be nominal. There is no evidence, and no logic, to suggest that heavy financial penalties for technical compliance errors will serve the purpose of the Act: To protect the environment and to impose the cost to clean up pollution on those who caused the pollution. Environmental Protection Act, Section 2(b) (415 ILCS 5/2).



NLU Exhibit WS-1

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*Arguments as to the Counts in the Verified Amended Complaint*

Beginning on page twenty, Defendants discuss several special factors that relate to the questions of remedies.

**I The CCR Counts: Counts XII, XIII and XIV**

It is true that NLU got off to a shaky start with the CCRs.

In 1999, no NLU CCR was filed (Count XII), and no certification of delivery was filed, either (Count XIII). NLU was one of about three dozen Illinois PWS that did not file a CCR in 1999. RR1[1] **At the time**, the remedy demanded by the EPA was simple: Report this failure in your 2000 CCR. RR2 (It was reported in the 2001 CCR.) RR3

In 2000, NLU filed a CCR that incorrectly identified NLU's source aquifer, and mistakenly reported that the EPA had completed an assessment of NLU's water source (Count XIV). The aquifer was identified as the "Illinois Prairie Aquifer," a fictitious aquifer used as an illustration in the paragraph the EPA recommended PWS operators use to report information about their source of water. The NLU water source is the Galesville Aquifer, and that name appears in all of its subsequent CCRs. A similar error occurred when NLU described possible sources of contamination to its water supply. The 2000 NLU CCR retained language from the paragraph the EPA suggested PWS operators use to report information learned from an EPA assessment of their water source. In 2000, the EPA had not yet completed a source water assessment ("SWA") for NLU. Therefore, no such information should have been reported. RR4 By the next year, the EPA SWA for NLU was finished, and correct information appeared in all

[1] Submitted herewith as Appendix A is a list of References to the Record ("RR") which indicate where evidence to support a particular point made in this Summation may be located in the trial Record.



subsequent NLU CCRs: no sources of contamination. These errors should be seen as mistakes caused by inattention, not violations committed with intention. There is no evidence that NLU willfully mis-identified its aquifer, or willfully reported the status of the EPA SWA for NLU.

But wasn't the 2000 CCR was filed after the June 30 deadline? The evidence shows that *two NLU CCRs were filed in 2000. The first, filed just before June 30, was filed by Steve Clark* - the person to whom the EPA mailed the information needed to complete the CCR. The second was filed by Armstrong[2] about one month later, after he obtained the needed information from Steve Clark. (Both Clark and Armstrong made the mistakes described, above.) Now, the EPA says the NLU CCR filed by Steve Clark does not count because it was not signed by Armstrong. When the EPA's reason to declare the 2000 CCR late came out at trial, the EPA employee in charge of the mailing, explained why the information needed to complete the CCR was sent to Clark rather than to Armstrong: RR5 We use a computer program to make our mailings. Clark's name was in the computer and our program does not permit the addition of another name for a simultaneous mailing.[3] It would be unfair to sanction NLU because the NLU CCR filed by Armstrong was late when the person to whom the EPA sent the necessary information, Steve Clark, filed an NLU CCR on time.

Injunction: Compliance has been achieved. Correct CCRs are being filed on time. RR7 There was no environmental harm. RR8 No injunction should issue.

Monetary Penalties: NLU caused no harm to the environment. Nor is there evidence that

[2] In the Summation, "Armstrong" means Armstrong, as President, not Armstrong, individually.

[3] Even though Armstrong has specifically asked the EPA to mail important information to him, the EPA still mails the information needed for the CCR to someone other than Armstrong. RR6.

it is necessary to impose penalties on NLU or Armstrong in order to deter other PWS operators. Mr. Styzen did not claim that NLU gained an economic benefit as a result of the CCR violations.[4]

Defendants suggest that there are only two possible reasons why the EPA kept these Counts in this case. (1) It wanted as many counts as possible to go to trial in order to create a negative impression of NLU and Armstrong (recall Plaintiffs' Opening Statement: "Fifteen separate Counts! Unbelievable!" (2) To keep these Counts in would increase the cost to defend.

**II The Test Kit Counts: Counts VII and IX**

The Court granted summary judgment against NLU on Count VII the chlorine test kit Count, and Count IX, the fluoride test kit Count. The order was based on the EPA affidavit. Sandy Sands swore that neither a DPD type chlorine test kit nor a fluoride test kit were at the well house on four separate days when she was there to inspect.[5] As to NLU, therefore, evidence as to test kits was allowed only for whatever relevance it may have on the question of remedies. However, since the Court did not enter summary judgment as to Count VII or Count IX against any other Defendant, as to them evidence regarding test kits is also relevant to the determination of liability.

While NLU did not present an affidavit to show that it had a DPD type chlorine test kit on the four days Sandy Sands reported it was not at the well house, evidence Plaintiff introduced at

[4] Defendants contend that Mr. Styzen's "economic benefit" analysis is neither valid nor applicable to any Count and the reasons it should be disregarded are explained in the special section re: remedies.

[5] Plaintiff offered no evidence as to whether either a DPD type chlorine test kit or a fluoride test kit was in the well house at any other time. An affidavit in the form "on a subsequent date I observed that the test kit was still not there" does not fill in the gap, because Sandy Sands, if called as a witness, would never be allowed to testify that no test kit was available on days she had no opportunity to observe. Such testimony would be hearsay and speculation.



trial shows that NLU does, in fact, have a DPD type chlorine test kit, and on at least some days that kit was at the well house. RR9 And evidence shows that NLU had a HACH type chlorine test kit, too. The EPA had declared the HACH type test kit acceptable. RR10 So the evidence, overall, shows that on different days when the EPA inspectors visited the well house, they observed that either a DPD type chlorine test kit or a Hach type chlorine test kit was present, but on the four days Sandy Sands inspected, a DPD type chlorine test kit was not present at the well house.

More significant, the evidence shows that fluoride and chlorine tests were routinely conducted for NLU. The EPA presented nothing to refute that evidence. Nor did the EPA present evidence to show that such test can be performed without an approved chlorine test kit. As such, the Court must conclude that some type of approved chlorine test kit was and is available to those who conduct chlorine tests for NLU. And the EPA cited no law or regulation that required the test kits to be "in the well house." In fact, since chlorine tests are to be conducted at points on the distribution system, the chlorine test kit must leave the well house at least from time to time. So, the fact that it may not have been in the well house on the four days Sandy Sands inspected may not be a violation at all.

Injunction: The evidence shows that NLU has the test kits, so compliance has been achieved. No environmental harm occurred. No injunction should issue.

Monetary Penalties: There is no evidence that failure to have a DPD type chlorine test kit or a fluoride test kit at the well house on any particular day caused harm to the environment. Nor is there evidence that unless NLU is harshly punished others may try to get away with not having a DPD type chlorine test kit or a fluoride test kit at their well house every day. Any rational PWS

operator would know that the modest cost of these test kits could never approach the cost to defend against these claims Mr. Styzen did not claim that NLU achieved an economic benefit by avoiding or delaying the cost to purchase test kits to keep at the well house.

**III The Testing Procedures Counts**

The procedures for testing are established by consultation between the EPA and the certified operator of NLU. No one else has any say in the matter. NLU has followed essentially the same testing procedures for years. Samples are drawn and tested by the on-site manager under the direction of the certified operator. For years, with the knowledge and acquiescence of the EPA, NLU has drawn samples and tested its water three times a week. This appears to be typical for operators of small systems. Now the EPA claims NLU must test samples every day. The reason for this change from the long-standing prior practice is not explained.

The EPA also wants distribution samples (water drawn from remote locations on the distribution system) to be drawn from particular locations. In the past, most distribution samples were drawn at the clubhouse. A sampling plan to guide this process has been established. (NLU has not barred its certified operator from drawing samples in Lost Nation, and never has.) Apparently, samples from these different locations will be required two or three times a year.

The Plaintiffs try to create the impression that water quality violations are frequent occurrence for the NLU PWS. This is not true. Water quality violations at the PWS almost never occur. Virtually all of Plaintiffs' evidence as to water quality violations relate to Well No. 8 - the shallow well near Flagg Road that served only the Pegorin house. Don Finch explained why it is almost impossible to draw a water sample at Well No. 8 that is not contaminated by the tap as the sample is drawn. Furthermore, the EPA knows that Well No. 8 was never connected to



the NLU PWS. RR11 It knows that test reports from Well No. 8 are not a measure of the quality of the water NLU provides to its customers. NLU's water, from its deep well, has proved to be of high quality over a period of many years. Still, Plaintiff dumps old testing logs from Well No. 8 into the Record. Another point, Plaintiffs' exhibits show the same events as recorded on different forms, so introduce all the forms to, in effect, double up the count. RR12 This is an intentional effort to create a false impression. To resort to such tactics in an attempt to discredit the quality of NLU's water be cannot be justified.

*Injunction:* NLU has caused no environmental harm. Its certified operator, in consultation with the EPA, established a testing plan, as did his predecessor. NLU has not interfered with any efforts to perform tests. No injunction should issue.

*Monetary penalties:* NLU must use an operator who is certified by the EPA. NLU is, therefore, entitled to believe that the EPA certified operator will perform (or oversee the performance of) the tests the EPA requires. If testing that is different from what has been performed over the last twenty or thirty years must now be performed, the new requirements should be worked out between the EPA and the certified operator. NLU asks only that it not be singled out and held to a higher standard of performance than other, small PWSs. Monetary penalties should not be imposed on NLU because of water quality violations that relate to Well No. 8. That well was never a PWS.

**IV The Old Lost Nation Water System Counts**

*A. Count XV - Flushing Hydrants:*

**If NLU water did not flow to customers in the south half of Lost Nation, Count XV could not be part of this suit.** There are only two reasons NLU water flows to homeowners in

the south half of Lost Nation.

The first reason: On September 20, 1976, this Court ordered NLU to allow the Lost Nation Property Owners' Association ("LNPOA") to connect the water main it wanted to install along Woodland Drive to the water distribution system NLU constructed to serve the New Landing Subdivision. RR13 That Order was entered over the objection NLU raised at that time, to wit: This Court lacks subject matter jurisdiction to enter the order the LNPOA wants because the ICC Uniform Main Extension Rule applies and must govern.[6] This Court did not order NLU to construct or operate the Woodland Drive water main. NLU did not construct that water main, and when it was finished, NLU did not operate the Woodland Drive water main. After completion, the Woodland Drive water main was operated by the LNPOA. The LNPOA charged users for the water provided through the Woodland Drive water main.[7]

The second reason: Someone connected the small, dead end lines in the south half of Lost Nation to the Woodland Drive water main. For many years prior to 1978, the small, dead end lines in the south half of Lost Nation were being used to distribute water from shallow wells in Lost Nation. In 1979, those small lines were connected to the Woodland Drive water main. By those connections, the NLU water that flowed into the Woodland Drive water main by virtue of this Court's 1976 Order came to flow into the small, dead end lines in the south half of Lost

[6] A subsequent order of this Court was entered on November 8, 1976 that required NLU to sign the Application for a Construction Permit that the LNPOA prepared to submit to the EPA. RR14 The portion of the Application NLU signed did nothing more than confirm that NLU had a water source sufficient to provide the water needed to serve those who the LNPOA expected to connect to the Woodland Drive water main. RR15

[7] After NLU's rates were set by the ICC, NLU was required by law to charge those who use its water. (Before its rates became effective, it would have been illegal for NLU to charge for use of its water.) Therefore, after February 15, 1980, NLU began to bill and collect from those in Lost Nation who use water provided by the NLU well.



Nation. No Court order authorized those connections. None of the homeowners asked NLU for permission to connect those small lines to the Woodland Drive water main. For NLU to connect those small lines to its distribution system would have violated the condition the ICC attached to NLU's Certificate of Public Convenience and Necessity: No small mains. RR16 All of the service problems customers recounted during the trial were described by homeowners living in the south half of Lost Nation - the homeowners (or their successors) who connected the small, dead end lines to the Woodland Drive water main.

The relationship between the service problems they experience and the decision these homeowners made to connect their small dead end lines to the Woodland Drive water main is apparent from the evidence. The evidence shows that on several occasions after 1980, property owners in the north half of Lost Nation asked NLU for permission to connect to the Woodland Drive water main. By this process, those property owners obtained water service from NLU under the terms of the ICC Uniform Main Extension Rule.[8] They receive water through properly-sized mains connected to the Woodland Drive water main. RR18 There is no evidence that these customers experience the kinds of service problems described by those in the south half of Lost Nation. NLU supplies water to more than 350 homes and approximately 1,000 residential users. The only witnesses who testified that they had water service problems live in homes served by the small, dead end lines in the south half of Lost Nation.

The evidence also shows that all property owners in the south half of Lost Nation have

[8] Under that Rule, the property owners who want the main extension advance the money to pay for the new main, and they are entitled to limited rights of repayment that depend on usage during the ensuing ten years. The Utility controls the design of the new line, secures the necessary permits, contracts for the construction and, upon completion, owns and operates the new line. RR17

the same legal right as those in the north half of Lost Nation to ask NLU to extend a water main to provide service to their property. By law, new distribution mains extending from an existing main (the Woodland Drive water main) would have to be provided under and in accordance with the requirements of the ICC Uniform Main Extension Rule. There is no evidence that anyone in the south half of Lost Nation ever asked NLU to extend a water main to provide service to any home in that area. There is ample evidence that if they had, their service problems would be solved: **No customer served by a main installed under the ICC Uniform Main Extension Rule testified about service problems.**

Another point needs to be made. There is no evidence that installation of flushing hydrants on the small dead end lines in the south half of Lost nation will solve the service problems homeowners in that area described. No witness claimed that flushing hydrants would *resolve their low pressure problems. Or reduce the frequency* of lines breaks in their area. Or eliminate the need to shut down their entire area in order to accomplish a repair. It is a cruel hoax for the EPA or the LNPOA to suggest to these homeowners that the service problems in their area will be solved by flushing hydrants. In fact, no witness testified with assurance that flushing hydrants would make it possible to flush debris from these small lines.

There was testimony that installation of flushing hydrants is not expensive. But the fact that it may be inexpensive cannot be the grounds for this Court to require NLU to install flushing hydrants. Furthermore, since it is inexpensive, who's stopping any of the homeowners in the south half of Lost Nation from installing flushing hydrants on any of the small, dead end lines? Not NLU. In fact, NLU has steadfastly denied any ownership of, authority over or responsibility for these small lines.



Injunction: The EPA wants the Court to issue an affirmative injunction which compels NLU to install flushing hydrants on four small, dead end lines in the south half of Lost Nation. The EPA bases its demand on the assertion that NLU operates these lines.[9] The facts show that NLU water flows through these lines for only two reasons: The 1976 Court Orders and the 1979 unauthorized connections. The facts show that NLU bills these users. It must. Under the Public Utilities Act, NLU must charge those who use its water, regardless of how they contrived to get it. The facts show that NLU arranges for repair of leaks. It must. NLU cannot impose on its customers the cost to pump water into the storage tower and then just watch it flow out a leak in Lost Nation and disappear into the ground. The Public Utilities Act prohibits such waste of water. **But everything NLU does to "operate" the small, dead end lines in the south half of Lost Nation stems from (a) the 1976 Court Order that forced NLU to allow the LNPOA to connect the Woodland Drive water main to the distribution system NLU installed to serve New Landing, and (b) the unauthorized connection of the small, dead end lines to the Woodland Drive water main by the property owners in this area.** If, in 1976, the Court (Judge Lenz) had not merely acknowledged the ICC Uniform Main Extension Rule, but had deferred to that Rule, none of the service problems would exist, and there would be no need to even consider these flushing hydrant issues.

The EPA appeals to emotion by recounting the testimony of users who have service problems. But are the problems homeowners reported caused by something NLU has done? No! The NLU water that flows into the Woodland Drive water main is just fine. It is the water that

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[9] The EPA's claim that NLU should install flushing hydrants because it owns these small lines seems to have been abandoned.

comes out of the small, dead end lines that fosters complaints. Low pressure? Inevitable. Those lines are too small. Too many interruptions of service to make repairs? Inevitable. The old system breaks frequently because it is primarily one inch to one and a half inch flexible plastic tubing (not suitable for use in a PWS) rather than four, six or eight inch PVC pipe. Too many boil orders? Inevitable. Every repair entails a loss of pressure throughout this system because there is no organized arrangement of shut off valves, and a boil order must issue whenever there is a loss of pressure. When it issues these boil orders, NLU is simply following EPA regulations. In fact, all of the service problems stem from those inadequate lines, cobbled together over time without any plan or proper engineering design to accommodate successive homes that were built in the area. NLU was not involved when these small lines were installed. NLU was not involved when these small, dead end lines were connected to the Woodland Drive water main.

In light of this history, these Defendants suggest that for the State of Illinois to insist that NLU is responsible for fixing these small, dead end lines is like the State ignoring a Quaker's legal right to "conscientious objector" status, forcing him to go fight in the front lines, and when he kills someone in the course of battle, charging him with murder. Proper analysis of the facts, and proper application of the law leads to one conclusion: **No injunction should issue.**

Monetary Penalties There is no evidence that failure to install flushing hydrants on four small, dead end lines in the south half of Lost Nation causes harm to the environment. The EPA tried to suggest pollution occurred because some witnesses testified that there was an odor to the water from their faucets. (There was no evidence of any odor in the NLU water that flows into the Woodland Drive water main.) But the odor in the water coming out of the faucets was described as chlorine, and the EPA requires NLU to inject a high dose of chlorine into lines



whenever it repairs a break. NLU should not be penalized for complying with EPA regulations. The EPA tried to suggest pollution occurred on the one occasion that water softener granules were flushed into a neighbor's sink. But there is no evidence that water softener granules were in the NLU water that flowed into the Woodland Drive water main. An event that occurred while the water was in the small system of lines that distributes water throughout the south half of Lost Nation caused the granules to be washed into the neighbor's sink. It appears to be a cross connection problem. The obvious preventive measure is for the homeowner with the water softener to install a back flow control valve so that the granules in his water softener cannot flow out through his service line and into the distribution system. Surely, NLU should not be penalized because some homeowner has improper or inadequate residential plumbing.

Nor is there evidence that unless NLU is harshly punished others may try to get away with not having flushing hydrants on small, dead end lines. If the State had been on top of the situation in the 1960's when Lost Nation was under development, those lines would never have been installed. They were installed before NLU was granted a Certificate to serve in Lost Nation. These lines would never have been installed if the NLU Certificate had been in effect at the time. It would be unfair to penalize NLU because the State failed to prevent the installation of this inadequate system, or because others built this inadequate system and connected it to the Woodland Drive water main.

NLU should not be required to install flushing hydrants on these small lines. As such, Mr. Styzen's analysis (which includes $2,000 as the cost for flushing hydrants) should be disregarded.

For all of these reasons, no monetary penalty should be imposed on these Defendants

under the claims asserted in Count XV - the flushing hydrants Count.

*B. Counts II, III and IV - The old Lost Nation shallow wells:*

**If the Lost Nation homeowners were still being served by the shallow wells they relied on before NLU was created, Counts II, III and IV could not be part of this suit.** The shallow wells in Lost Nation were in service before 1972, the year NLU was incorporated. They were the source of water supplied through the water distribution system that served Lost Nation. The Illinois Department of Health (predecessor of the EPA) declared that water supply and distribution system a PWS in 1969. RR19 The developer of Lost Nation and/or the LNPOA operated the system as a PWS for many years prior to February 15, 1980.

In 1978, the LNPOA undertook the construction of the Woodland Drive water main. (The court proceedings are described, above.) Upon its completion, the LNPOA operated this water main. The EPA knew the Woodland Drive water main was being constructed to replace the shallow wells. RR20 Even though it had the authority to impose conditions on both the construction permit it issued and the operating permit it issued, the EPA did not condition either the construction or the operation of the Woodland Drive water main on the proper abandonment (plug or otherwise seal) of the shallow wells. The EPA allowed the LNPOA to construct and to operate the Woodland Drive water main. RR21 As many as seven shallow wells were abandoned by the LNPOA when the Woodland Drive main was placed in service.[10] When it took

[10] One additional shallow well, No. 8 (the well that for thirty years served only the Pegorin House on Flagg Road ), remains fully functional, but no water has been pumped from this well since December, 1999. For a period of time in the early 1980's, NLU operated Well No. 8 and charged Mr. Pegorin for the water pumped from this well. In 1999, when a water main was installed from near the New Landing Gatehouse then east to the south line of the Pegorin property, NLU paid to extend that water main past the Pegorin house, and to install a service connection from that new water main to the Pegorin house. As part of that work, Well No. 8 was disconnected from the Pegorin house.



the shallow wells out of service, the LNPOA did not plug or otherwise seal the shallow wells. The EPA took no action to require the LNPOA to plug or otherwise seal the shallow wells thus taken out of service.

The evidence shows that NLU never had one thing to do with the shallow wells. Plaintiff presented no evidence that NLU ever owned them. NLU did not pump or distribute water from them. It did not charge for water pumped or distributed from them. It did not place them in service, and it did not take them out of service. It never gave anyone else permission to use them or to take them out of service. It never had and never tried to exercise any authority over them, and never assumed any responsibility for them. For many years prior to 1979, the developer of Lost Nation and/or the LNPOA owned the shallow wells, used them, operated them, and charged for the water they produced. In 1979, the LNPOA took them out of service.

*Injunction:* There should be no injunction. These Defendants should not be "enjoined" to clean up the mess the EPA allowed others to leave behind.

*Monetary Penalties:* There should be no monetary penalties. These Defendants should not be fined because they have not cleaned up the mess others left behind. There is no evidence of environmental harm. Yes, there was testimony of the potential for environmental harm: some pollutant *may* enter the NLU source aquifer through one of the old Lost Nation wells. (Mr. Dunaway also testified that there was an impermeable strata that separated and isolated these wells from the NLU source aquifer.) But this was the case when they were abandoned by the LNPOA in the late 1970's. This threat has been lurking, as it were, for more than 30 years. The seriousness of this threat can be judged by the urgency of the EPA action when these wells were abandoned by the LNPOA. At that time, the EPA had the opportunity to force the issue: It could

have conditioned the construction permit or the operating permit for the Woodland Drive water main on proof that the LNPOA had plugged and sealed these wells. It did not. Now it wants this Court to make this an "environmental crises" created by NLU. The facts undermine the effort.

## V The Cross Connection Count

This is about whether NLU must conduct customer surveys. Under the NLU Rules, cross connections are prohibited, and customers can be disconnected if they have cross connections. RR22 What the EPA wants is for NLU to require its customers to submit to house-to-house inspections and to file written certifications that they have no cross connections. It appears that the ICC has not embraced this idea. It has issued no General Order that requires all water utilities to conduct such surveys, and the ICC staff has not included such a requirement in its suggested standard rules, regulations and conditions for service. RR23

The ICC sets NLU's rates and determines what rules, regulations and conditions of service it shall have in place. NLU must abide by ICC requirements. Does NLU want to conduct these customer surveys? Not particularly; who wants to be the bad guy? Will it follow ICC directive. Of course. Let the EPA and the ICC figure out how this surveying is to be carried out. NLU will abide by the decision. But NLU is tired of being in the middle.

*Injunction:* There should be no injunction. No environmental harm has occurred. What the EPA wants, the ICC appears to want to avoid. In terms of the rules it adopts and imposes on its customers, NLU is entitled to give deference to the ICC over the EPA.

*Monetary penalties:* There should be no monetary penalties. NLU should not be fined for being caught in the middle. Certainly, there is no evidence that environmental harm has been caused because NLU has not adopted the cross connection survey rule the EPA wants



## VI The Certified Operator Count

There is no dispute: NLU did not have a Responsible Operator In Charge ("certified operator") from January, 1994, until May, 2001.[11] There can be no dispute as to what the EPA and its field inspector, Sandy Sands, did. The Court can reasonablely find that NLU's certified operator, Gerald Carlson, resigned because of the EPA's threat to initiate an enforcement action. No testimony refutes testimony of Don Finch and Armstrong as to the efforts they made to recruit a replacement for Gerald Carlson, and the reason they were not successful in this effort: all the operators in the area were aware that there was a "problem" between the EPA and NLU and nobody wanted to get involved. There is no dispute as to the fact that Rusty Cox agreed to serve only after this suit had been filed (before then, he had declined).

While the Court has ruled against NLU on its counterclaim for interference with contract and its affirmative defense of "unclean hands," it allowed Defendants' evidence as to this history for whatever relevance it may have in respect to the issue of remedies. This entire history, and the ability of NLU to retain a qualified person to serve as its certified operator, is inexorably tied to the dispute between NLU and the EPA over whether the EPA can compel NLU to replace the small, dead end lines in the south half of Lost Nation. That topic is discussed at length in the separate section of this Summation that deals with special matters relating to remedies. That discussion most especially pertains here.

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[11] A small PWS is unlikely to employee a certified operator; the work load does not require a full-time employee, and the PWS would not likely to be able to afford a full-time certified operator. The Responsible Operator In Charge system, established under the authority of the EPA, involves a contract between the PWS and a qualified certified operator whereby the certified operator oversees the operation of the PWS and most day-to-day duties are performed by someone who is on-site and carries out the directions of the certified operator. The certified operator signs the logs that are created to evidence the manner in which the PWS is being operated. This arrangement allows the small PWS to secure the benefit of a certified operator even though it could not otherwise afford to hire a certified operator.

*Injunction:* There should be no injunction. NLU retained a certified operator in May of 2001. Mr. Cox continues to serve. There is no evidence that environment harm occurred because NLU did not have a certified operator.

*Monetary penalties:* NLU did not cause environmental harm. Because of the history explained in the separate section relating to remedies, NLU suggests there should be no monetary penalties. The EPA put NLU in the position that gives rise to the violation that might otherwise justify imposition of a monetary penalty. Because of the EPA's continuing insistence that it could compel NLU to replace the small, dead end lines in the south half of Lost Nation, and its announced intention to file an enforcement action to compel NLU to replace those lines, NLU found itself in a position from which there was no way out except to capitulate to the EPA's improper and illegal demands. But capitulation was not an available alternative. Even if NLU had the money to undertake replacement of those lines, to do so would have been a violation of the ICC Uniform Main Extension Rule. To violate an ICC Rule could result in sanctions by the ICC, or even criminal prosecution. Furthermore, to use NLU funds (which, one way or another, come from the customers) to replace those lines would impose an unfair financial burden on the customers in all other parts of the service territory. To impose a substantial monetary penalty would bestow a victory on the EPA for what it did to NLU. All things considered, that hardly seems appropriate.

## VII The Storage Tower Count

Paint the exterior: The water storage tower needs to be re-painted. But its present conditions causes no pollution. Its present condition has not impaired the quality of the water NLU provides to its customers. Armstrong testified as to the plans to ask the ICC to increase

NLU's rates so that funds to accomplish this work will become available.

Extend the overflow pipe: The overflow pipe should extend to the ground. It is hard to understand why the EPA allowed those who erected the tower (pursuant to an EPA construction permit) to terminate the overflow pipe near the top rather than extend it to the ground. It is harder to understand why the EPA issued an operating permit when the tower was not built according to the EPA approved plans. NLU is now asked to clean up another mess the EPA allowed others to leave behind. In connection with other work on the tower, NLU intends to extend the overflow pipe to ground level.

Add access barriers: NLU questions the EPA's demand for additional access barriers. Years ago, vandals painted graffiti on the tower. Don Finch installed barbed wire barriers that he fitted to each leg of the tower. While it may be possible for kids to get over these access barriers, no additional graffiti has been painted on the tower for many, many years. RR24 In short, the barriers seem to be doing the job. There is no testimony that a fence around the tower would be of much help. In fact, it may be easier to climb over a fence than it has been to climb around the barbed wire barriers on the legs of the tower. The added benefit, if any, might not justify the added cost.

*Injunction:* The condition of the tower does not harm the environment, or threaten to pollute the environment. NLU's water exceeds all standards. No injunction should issue.

*Monetary penalties:* NLU has no money to paint the tower. It is trying to get a rate increase in order to generate additional revenue so it can paint the tower, and extend the overflow pipe to ground level (and fence the tower if that work seems necessary). By law, the ICC is allowed eleven months to decide the NLU rate case. Imposing substantial monetary penalties on



NLU is unlikely to motivate the ICC to accelerate its work on the NLU rate case. NLU has not spent the money needed to perform these tasks on some other, less important projects[12] No monetary penalty should be imposed.

**VII The Operating Permits Count**

The new pump: There appears to be no dispute as what happened: The pump at the well was replaced. The dispute concerns the new pump, itself. If the new pump is so different from the old pump (they both pump water from the same well to the same tower) as to require an EPA permit, then a permit should have been secured. No one applied for an EPA permit when the pump was replaced. NLU hired an experienced, qualified company, licensed by the State, to do this work. An experienced, licensed engineering firm provided limited oversight. Apparently, neither the company that performed the work nor the engineering firm believed an EPA permit was required. The new pump was installed. Proper tests to insure safe, clean water were conducted. The results were satisfactory, and were sent to the EPA.

*Injunction:* No injunction should issue; the Court should find that the new pump is not so different from the old pump as to trigger the requirement to obtain an EPA permit. NLU's failure to obtain an EPA permit caused no environmental harm.

*Monetary penalties:* No monetary penalties should be imposed. NLU acted in a reasonable and responsible fashion: It contracted with a licensed company, and relied on licensed engineers. Reasonable people could have different opinions as to whether an EPA permit was

[12] NLU certainly has not distributed money as dividends or lavished large salaries on Armstrong. He has never been paid for his work as President of NLU. (Moneys have been paid to family members, to his law firm and to a partnership - he is managing partner - that rents a small office to NLU. There is no credible evidence that any of those payments were for anything other than services needed by and provided to NLU.).

required for the replacement of the pump. All precautions to insure safe water were observed.

The new main extensions: During the time NLU had no certified operator, the EPA issued permits for the construction of two main extensions that were thereafter constructed under the terms of the ICC Uniform Main Extension Rule: The Knollwood main extension and the Kreger main extension. After construction, proper tests were conducted to insure these lines were safe for the distribution of potable water. Because NLU had no certified operator, no EPA operating permit could issue for either line.[13] It appears that the developer who requested and paid for the Knollwood main extension turned that line on sometime after it was completed, at least initially, to water landscaping he had planted. Over the ensuing years, six homes connected to the Knollwood main. The evidence as to the Kreger main extension is unclear, but it has been turned on, and two homes along Flagg Road are connected to this line. (One, the old Pegorin home, appears to be unoccupied.) RR26

The facts are as described, above. Initially, the violation occurred because NLU had no certified operator and for that reason the EPA refused to issue operating permits for these two mains. The violation continues not because NLU has no certified operator, but because the EPA objects to the qualifier Armstrong added to the Notification form.

*Injunction:* No injunction should issue. No harm to the environment has occurred. The Court should not have to tell these parties to stop playing this little game over eight words added to a pre-printed form.

[13] Even though NLU has had a certified operator since May, 2001, the EPA continues to refuse to issue any operating permits because of eight words Armstrong added to the Notification form. RR25 The concern that led Armstrong to add the limiting phrase was that the EPA would try to use an unqualified Notification as support for its claim in this case that NLU is the owner of the old Lost Nation water facilities.



*Monetary penalties:* There should be no monetary penalties. No harm to the environment was caused by the fact that NLU was unable to secure operating permits for two water mains that serve a total of eight homes. The history recounted below provides ample reason for the Court to reject the EPA's demand that substantial penalties be imposed on NLU.

## SPECIAL FACTORS RE: REMEDIES

The Defendants believe the following special factors should be considered in respect to any issues concerning remedies. They impact several Counts.

**FIRST: The EPA's demands that NLU replace the small water lines in Lost Nation**

This long-standing demand raises the single most important issue in this case. It has a major impact on what remedies may be appropriate as to all but one Count. For years, the EPA insisted it had the authority to compel NLU to replace these lines. Now, documents from the EPA show that all along the EPA knew that it could not compel NLU to replace these lines.

The evidence Plaintiff introduced reveals the EPA's position - and shows how it changed. For at least twenty years, the EPA prepared and mailed to NLU Evaluation Reports ("ER") that identified the small lines in Lost Nation as deficiencies (*i.e.*, violations of the Act or Regulations) that NLU was required to correct). Over these years, when the EPA field inspectors met with NLU representatives and operators, they asserted that NLU was required to replace these lines. When EPA attorneys and representatives met with Armstrong or exchanged correspondence with him about this issue, they insisted that the EPA could require NLU to replace these lines. Every time NLU offered to perform the tasks that would resolve some or all of the claims in this case, the EPA refused the offer unless NLU also agreed to replace these lines. Whenever the EPA

proposed a Letter of Compliance, Compliance Consent Agreement or a Consent Judgment, it included provisions which required NLU to acknowledge a legal obligation to replace these lines, and imposed severe sanctions for failure to complete the work within the time the EPA was willing to allow. RR27 When Sandy Sands, an EPA inspector, met with NLU's on-site manager (Don Finch) and its certified operator (Gerald Carlson) in late November, 1993, she again told them that the EPA could require NLU to replace these lines and, since prior directions to replace these lines had not been followed, she was referring this matter to the EPA's legal counsel for enforcement action, *i.e.*, to file suit. She reiterated this in the ER she sent to NLU and to its certified operator on December 2, 1993. RR28

This suit, an enforcement action, was filed in December, 2000. But no count to compel replacement of the small lines was included. The EPA's own document shows why:.

> "The Agency has not included requiring replacement of the existing undersized watermains in the development in this complaint. An exception from replacing existing watermains exists in the Agency regulations (35IAC Section 653.203) as long as the minimum pressure of 20 psi can be maintained. Sections of watermains must be replaced with materials that meet current minimum requirements if pressure in the subject watermains cannot be maintained above 20 psi, or if sections fail and need replacement. Minor repairs are (sic) to existing undersized watermains are permitted to be made without replacement of all undersized watermains that exist in the system. This exception applies to all community water system (sic) in Illinois." (Defendants' Exhibit 5, par. 1 on p. 4. EPA Memo of July 12, 2001.)

After trying to bully NLU for twenty years, the EPA finally admits that NLU has been right all along. **The EPA acknowledges that it cannot compel NLU to replace the small water lines in Lost Nation.** This fact finds additional, irrefragable evidence in the Record:

Deficiencies vs. recommendations: For many years, the demand that NLU replace these lines was included in the part of the ER that detailed deficiencies. Deficiencies are items the



EPA contends are violations of the applicable laws and regulations and, therefore, must be corrected. If they are not, the EPA claims the right to file a lawsuit to compel compliance. Items that the EPA would like to see addressed are detailed in that part of the ER that lists the EPA's recommendations The EPA makes no claim that it can file an enforcement action to compel a PWS to accept or act on its recommendations.

In the ER dated June 3, 2003, the EPA dropped its demand that NLU replace these lines from Schedule A: the section that detailed deficiencies. Prior to that date, these lines had been listed as deficiencies - violations as to which correction is required. The EPA continued to insist that these lines were deficiencies even though it knew from as early as May 1, 1995, that the exception, quoted above, applied. (See, Plaintiff's Exhibit 3, ER of May 1, 1995, par. 6 of Attachment A.) Finally, in June, 2003, the EPA included a suggestion that these lines be replaced in Schedule B - the section that detailed the EPA's recommendations. This evidence is an admission by the EPA that it cannot compel NLU to replace these lines, it can only recommend that they be replaced. Twenty years of the EPA's adamant insistence are wiped away when the replacement of these lines was moved from "deficiencies" to "recommendations." That the EPA Memo quoted, above, is dated only eight months after this case was filed deserves to be noted by the Court. This is especially true in light of Armstrong's testimony that NLU was willing to do everything the EPA requested in this suit, but only if the EPA would agree that NLU could not be compelled to replace these small Lost Nation lines. (See, Plaintiff's Exhibit 99, par. 8.)

EPA Regulations: The EPA acknowledges that, while these lines may be substandard, so long as they meet minimum water pressure requirements, no one can be compelled to replace

them. This is the EPA's rule. The EPA recites this rule in July 12, 2001 Memo (quoted, above). It set out the terms of its Rule in paragraph 6 of Schedule A to its ER of May 1, 1995, and in paragraph 3 of Schedule B to the ER of June 24, 2003. There is no evidence to show that it is not possible to maintain the minimum water pressure in these lines. Since the minimum water pressure requirement is being met, these lines may continue to be used. By its reliance on its own rule, the EPA acknowledges that it cannot compel anyone to replace these lines.

These Lines are "Grandfathered": These lines are "grandfathered in." They were in place before the Environmental Protection Act became law. Plaintiffs offered no evidence to show that the EPA has authority to apply, retroactively, the laws and/or regulations in order to compel replacement of these lines. Counsel for the EPA, Christine Bucko, acknowledged this fact in her argument to the Court in support of Plaintiffs' Motion for Summary Determination (of the question of ownership of the old Lost Nation water facilities). A copy of the relevant portions of that transcript have been provided to the Court.

There is no room left for the EPA to argue. Its own evidence proves that the EPA never had the authority to compel NLU to replace these lines. Nevertheless, it should be noted that Armstrong's testimony explained other valid reasons why the EPA cannot compel NLU to replace the small water lines in Lost Nation: NLU does not own these lines. No court ever ordered NLU either to own or to operate these lines. The EPA has no authority to require NLU to own or operate these lines. The ICC, the only agency that can authorizes NLU to own and operate utility facilities, never authorized NLU to own or operate these lines. To own these lines would violate the condition the ICC attached to NLU's Certificate to operate as a public utility. For NLU to replace these small lines would violate the ICC Uniform Main Extension Rule.



The pervasive impact this matter has on this case is hard to overstate. The Court can and should conclude that Gerald Carlson resigned because Sandy Sands told him the EPA was going to bring an enforcement action because NLU would not agree to replace these lines. If Carlson had not resigned, he may still be serving as the NLU certified operator. He'd served for many years, and there is no evidence that he was unwilling to continue to serve, except for the EPA threat of suit over replacement of these lines. If Carlson had not resigned, there would have been no basis for Count I. If NLU had had a certified operator, it could have qualified for the operating permits that are the basis for the Count X. If the EPA had not insisted that NLU is responsible for the old Lost Nation water system, there would be no Counts II, III, IV or XV - all of which relate directly to the old Lost Nation water facilities. It is possible, indeed, probable, that concerns about test kits and the sampling procedures could have been more easily addressed and resolved if Gerald Carlson had continued as certified operator, and there would have been no basis for Counts VI, VII, VIII and IX. Perhaps Gerald Carlson could have provided important advice to Armstrong about compliance with the CCR requirements. (He certainly would have known that the "Illinois Prairie" aquifer was not NLU's source of water.) The only thing that may have been beyond Gerald Carlson's ability to help resolve or avoid is painting the tower.

**Second, Issues re: the Styzen Economic Benefit Analysis:**

A. The Styzen Analysis ought to be disregarded

There are several reasons why the Court ought to disregard Mr. Styzen's analysis of the economic benefit of delayed or avoided costs ("Styzen Analysis"). This type of analysis is new to Illinois law. However, the criticisms offered apply as well to cases from other jurisdictions.

The principal Illinois case is *Panhandle Pipeline*, a case in which Styzen testified. In that

case a corporation and its officers (who, interestingly, the EPA did not sue) knowingly exceeded the discharge limits (*i.e.*, they polluted the air with tons of nitrogen oxides) in the special EPA operating permit that allowed the corporation to avoid the cost of expensive emissions "scrubbers." RR29 Mr. Styzen used his model to calculate the economic benefit the corporation achieved by using the money it should have spent to install the scrubbers for other purposes.

1. *Not applicable because no pollution*: This type of economic benefit analysis has been used only in cases that involve either abatement or cleanup of pollution. The reason is obvious. Do you really need this type of analysis to decide cases that involve the failure to have an inexpensive chlorine or fluoride test kit at the well house, or to file a four-page CCR, or a CCR that was free of mistakes? And is retaining a certified operator really equivalent to the purchase of pollution control equipment? This is not a pollution case. Mr. Styzen really analyzed only Counts XI and Count I.[14] In Count XI, the EPA asks the Court to compel NLU to paint the exterior of the tower, to extend the overflow pipe to ground level, and to install additional access barriers to hinder kids who might paint graffiti on the tower. There is no evidence that failure to accomplish any of these items has caused or will cause pollution. There is no pollution control equipment the EPA claims NLU should have installed. In Count I, the EPA asks the Court to compel NLU to retain a certified operator. Failure to have a certified operator over a period of time did not cause pollution. Retaining the services of a certified operator is not the same as purchasing pollution control equipment.

3. *No money:* This case is also different from *Panhandle* in that NLU did not use the

[14] The figures Styzen plugged in for the cost to seal the Lost Nation wells ($7,425) and to install flushing hydrants ($2,000) would be ignored if the Court finds that NLU is not required to perform that work.



money it should have spent to do what the EPA wants for some other purpose. NLU did not and does not have the money to paint the exterior of the tower.[15] Over the last twenty years, NLU has lost more than one million dollars ($1,000,000). Furthermore, unless the ICC allows NLU to increase its rates, NLU will not be able to get the money to paint the tower. It cannot borrow the money without prior approval of the ICC. Since NLU has been unable to pay the loans the ICC has already approved, it seems unlikely that the ICC will authorize NLU to borrow more. And who would grant NLU a loan, knowing it has been unable to pay its existing, first priority loans? No one. NLU cannot issue additional stock without the prior approval of the ICC. To seek permission seems futile. Even if the ICC were to authorize the sale of additional stock, who would buy stock in a closely-held corporation that is behind in the payment of a loan secured by a mortgage on all its property, has never earned a rate of return, has never paid a dividend, has lost money every year, and is required by law to supply its products even though it cannot raise its prices without the approval of the ICC? In truth, no one.

Why not let Armstrong advance the money? First, there is no evidence that Armstrong has the money. Second, not only would any loan or stock issue have to be approved by the ICC, but also, because Armstrong is an "affiliated interest" of NLU, any stock sale to Armstrong or loan from him would be void without the prior approval of the ICC. Armstrong would end up with no legal right to the stock he "purchased" or to be repaid the loan he "made." These are very good reasons to conclude that "let Armstrong advance the money" is not an option.

[15] NLU probably could have found funds to extend the overflow pipe to ground level. It may have been able to find money to install additional barriers to keep vandals from climbing the tower, if there were reasons to think the additional barriers were necessary or that they would be effective. NLU would gladly have paid a certified operator if one had been willing to serve.

4. *No evidentiary support:* This reason to disregard the Styzen Analysis relates to the water tower claims. These parts of the Styzen Analysis lack the required evidentiary foundation. The starting point for the Styzen Analysis as to Count XI is to identify the costs the EPA claims were delayed. If those costs are not in the Record, there can be no Styzen Analysis. The evidentiary problems as to the water tower claims are fatal and cannot be repaired.

a. Painting the tower: In Count XI, the EPA asks the Court to compel NLU to (I) paint the exterior of the tower, ii) to extend the overflow pipe, and iii) to install additional access barriers. That's it. Three items. The cost to do this work is the cost NLU has, presumably, delayed. The Styzen Analysis, therefore, must be an analysis of the economic benefit NLU achieved because it delayed these costs - and only these costs. Therein lies the fatal problem.

As his starting point, Mr. Styzen used the price quoted in the contract proposal for renovation and continuing maintenance of the water tower that NLU filed with the ICC. RR30 However, the work to be accomplished under that proposed contract includes many, many items. Paint the exterior and extend the overflow pipe are included in the price quote, but installation of additional access barriers is not. RR31 Of critical significance is the fact that there is no itemization of the cost to perform each component of the work covered by the price quote. Mr. Styzen used as his starting point a price quoted to perform a laundry list of at least thirteen items of work, not including the cost to install additional access barriers. He analyzed the economic benefit achieved by delaying the cost of the items in the contract proposal, not the economic benefit of achieved by delaying the cost of the items identified in Count XI. Styzen analyzed the wrong costs! And there is no way to extract from the lump sum price quoted in the contract proposal the separate cost to perform the three items the EPA specified in Count XI - especially



since one of the three items is not even included in the contract proposal.

b. Annual maintenance of the tower: For the starting point of his analysis of the economic benefit achieved by failing to perform annual maintenance on the tower, Mr. Styzen used the annual maintenance fee quoted in the proposed contract: $8,758. RR32 But the $8,758 fee includes payment toward future re-painting of the exterior and the interior of the tower. And it includes payment to cover future work that may have to be performed to make sure the tower meets EPA regulations that have not yet been imposed. RR33 This is because under the proposed contract Utility Service Company, Inc. takes full responsibility for all future maintenance, repair and upgrades of the tower, including repainting whenever necessary, for the annual fee of $8,758.

The scope of the annual maintenance work is described on page six of the proposed contract. It envisions a couple of guys will come out to inspect the tower, climb it to make closeup observations, do some touch up painting as may be necessary, rinse it out (on alternate years) and go back to the office (in Watertown, Wisconsin). It is hard to imagine that this annual maintenance work would take more than a two or three hours on site. The charge for the annual maintenance work is not, therefore, $8,758. Utility Service Company, Inc. and NLU, should it accept the proposed contract, clearly intend for the $8,758 to be sufficient to enable Utility Service Company, Inc. to accumulate over time at least enough money to cover re-painting of the tower, inside and out, every few years as needed.

The proposed contract does not itemize the cost to perform the component parts of what is included in the $8,758 fee. Logically, almost all of the $8,758 must be a prepayment for periodic re-painting and/or upgrades. These are not costs that were delayed or avoided in the

past, they are costs that may be incurred in the future. Yet Mr. Styzen assumes that $8,758 (adjusted by the PCI) should have been paid every year from 1993 forward. RR34 He treats the entire $8,758 as an "avoided" cost. **Once again, Styzen analyzed the wrong costs!** Because there is no evidence as to what the correct number would be, the fatal evidentiary error cannot be corrected.

In respect to his analysis of the water tower, the numbers he used as his starting point are not found in the Record. Therefore, $185,963 of his calculated economic benefit, the amount related to the water tower, must be ignored.

B. If the Styzen Analysis applies, the right numbers must be used

Mr. Styzen acknowledged that if you change the numbers used as the starting point of the analysis, the calculated results change (*i.e.*, the "economic benefit" will change). RR35 So if the Court thinks use of the Styzen Analysis may be appropriate, it must make calculations using the right numbers as the starting point.[16] The numbers Mr. Styzen used as the starting points for his calculations are not correct.

1. *Count XI - the water tower count:* Mr. Styzen used $224,484 as his starting point.[17] Using the *Chemical Engineering Magazine* Plant Cost Index (the PCI), he adjusted (reduced) that number to account for price changes (inflation) to determine a cost for the work as of November, 1993: $203,385 RR36 While Mr. Styzen's starting point is clearly wrong (for the reasons

[16] Mr. Styzen's analysis is really just addition, subtraction, multiplication and division - math we all learned in grade school. From its own experience in the everyday affairs of life, the Court can know that any of us can perform the calculations described in the notes in his spreadsheets, and that it is really quite simple to use a spreadsheet program (like he used) to "crunch" the numbers.

[17] For purposes of this analysis of Mr. Styzen's calculations, NLU recognizes, but ignores, the fact that the $224,484 includes costs to seal the Lost Nation Wells ($7,425) and to install flushing hydrants ($2,000). These other costs do not make a material difference to this part of the NLU criticism of the Styzen Analysis.



explained, above), the evidence shows the EPA did have an estimate of the cost to paint the tower. In his August 20, 1988, letter to the EPA, Don Finch estimated that cost would be $26,000. RR37 What results do you get if you use as a starting point the cost estimate Mr. Finch gave the EPA? Run the numbers. Of course, use the same methodology Mr. Styzen used, and perform the same calculations he performed[18].

Attached as Appendix B are the calculations that use cost estimates supported by the evidence (Don Finch's letter to the EPA) rather than the cost estimate Mr. Styzen gleaned from the price quote in the proposed contract. Here's how the calculations compare:

Styzen calculation, starting with price quotes totaling $224,484: **$113,239.**
NLU calculation, starting with cost estimate of $26,000: **$ 16,422**

What does it mean? It means that the EPA, with the $26,000 estimate in hand since 1988, kept it from Styzen. Instead, Plaintiffs asked him to determine his starting point from the price quote in the proposed contract. As that amount was nearly ten times greater, inevitably, the calculated economic benefit would be substantially greater. By being "selective" as to the information it provided, the EPA led Mr. Styzen to fabricate support for an outrageous penalty.

2. *Tower Maintenance:* As his starting point for his calculation, Mr. Styzen used the annual maintenance fee quoted in the proposed contract: $8,758. Starting with that amount (which is wrong for the reasons explained, above), he calculated an economic benefit: **$72,724.** No one testified as to what it would cost for a couple of guys to come out once a year and do the annual maintenance work described in the proposed contract. However, if one relies on one's

[18] The year from which inflation adjustments are calculated changes, 1985 or 1988 rather than 2003. But the inflation adjustment calculations are the same regardless of whether one must adjust forward in time (from 1985 or 1988 to 1993), or adjust backward in time (from 2003 to 1993)

experience in the everyday affairs of life, and plain common sense, one can determine that a charge of approximately $300 would seem more reasonable: Two hours travel, three hours on site, for two men at $30 per hour, each ($30 x 2 men x 5 hours = $300.).[19] Using $300 as a starting point for the calculation, the Styzen Analysis produces an "economic benefit" of **$1,839**, not $72,724. The reduction that results from using the right starting point is more than ninety seven percent! Even if $300 is too low, and $600 is closer to the probable cost, the "economic benefit" will likely be less than one-tenth of the figure Styzen calculated based on $8,758.

3. *Count I - the certified operator count*: Mr. Styzen used as his starting point the $500 per month, which is what NLU paid Rusty Cox in 2001, rather than the $200 per month NLU paid Gerald Carlson in 1993. RR38 The impact of this choice is significant because the PCI Mr. Styzen used reflects annual price changes that are minuscule. (Remember, the smaller the price change, the smaller the reduction). Over the seven-year period, 1993-2000, in four of these years, 2000, 1999, 1998, and 1996, the annual price change is less than one percent. RR39 Using the PCI, Styzen adjusted the certified operator cost from $500 per month in 2001 to $465 per month in 1993 - 7% in 8 years. This is why Mr. Styzen's calculated economic benefit of avoided costs is **$39,422**.

Of course, when you start with $200 per month in 1993, and use the PCI to adjust it forward in time to 2001, the increase is likewise about seven percent (7%). The 1993 cost, $200 per month, increases to $219 per month in 2001. Using $200 per month as the starting point, the Styzen Analysis produces an economic benefit of **$16,865** - a reduction of more than one-half.

[19] A Washout Inspection, performed every other year, probably would take a little more time than an Engineering Inspection. (See page six of the proposed contract.)



And when you also take into account the difference between what NLU has had to pay Rusty Cox (from 2001 through 2003) by comparison to what it would have paid Gerald Carlson for this period, the calculated economic benefit of avoided costs is **$7,815**, a reduction of four-fifths.

Summary: By starting with the wrong costs, Styzen calculated "economic benefits" totaling $225,385. If the Styzen Analysis applies, and the right costs are used, the calculated "economic benefits" are no greater than $26,076.

*Synopsis of the Activities of Armstrong, as President*

The evidence shows that Armstrong prepared and distributed the NLU CCRs (except for the 2000 NLU CCR prepared and distributed by Steve Clark). He negotiated the contract with the current certified operator, Mr. Cox, and the contract for the replacement of the pump at the water well. He has had nothing to do with the abandoned Lost Nation wells, and has not authorized anyone else to have anything to do with those wells. He has approved the repair of small water lines in Lost Nation by contractors who bill NLU for the repair work they perform. Except for such repair work, he has not authorized anyone to perform any other work on small water lines in Lost Nation. He has not been involved with, or interfered with, any aspect of the testing of water by those who perform the tests and prepare and submit reports of test result to the EPA, and has always been willing for NLU to pay for any kit or tool anyone involved with water testing needed in order to perform the work. Except to confirm, if asked, that NLU is able to provide the water to a proposed main extension, he is not involved with the preparation of applications to the EPA for construction or operating permits pertaining to water main extensions or other water utility facilities. He has had no personal involvement with the physical maintenance of any of NLU's water utility facilities. He is not certified by the EPA to serve as

an operator of any PWS.

More generally, the evidence shows that in respect to NLU, Armstrong pays the bills due to suppliers and providers, and pays any other amounts due by NLU. He decides what rules, regulations and conditions of service NLU will file with the ICC. He deals with governmental agencies on various matters, other than operations, that pertain to NLU. He prepares reports, other than operating reports, that NLU must file. He arranges for the services that independent contractors provide for NLU, and provides input, when requested, to those who thus provide services for NLU. Except for records that relate to the operation of utility facilities, he maintains the books and records of NLU.

There is no evidence that anything he has done has caused or threatened to cause pollution or harm to the environment.

*Synopsis of activities of Armstrong, individually*

The overwhelming preponderance of the evidence shows:

that Armstrong, individually, has performed no task or function whatsoever for NLU,

that he has neither the responsibility nor the authority to perform any task or function for NLU or any task or function with respect to any facilities or property owned or operated by NLU,

that he has not performed any task or function for NLU or any task or function with respect to any facilities or property owned or operated by NLU, and

that he has done nothing that caused or threatened to cause pollution or harm to the environment.

Respectfully submitted,

_____

One of the attorneys for the Defendants



APPENDIX A

*Defendants' List of References to the Record*

| RR No. | Reference to the Record |
|---|---|
| RR1 | Defs. Exhibit 9, EPA letter of 03/10/00; Reed Trans p. 81. |
| RR2 | Pltfs. Exhibit 47. |
| RR3 | Pltfs. Exhibit 50, 2000 NLU CCR, p.1; Reed Trans p. 79 |
| RR4 | Reed Trans p. 77. |
| RR5 | Reed Trans p. 46-47. |
| RR6 | Defs. Exhibit 12; Pltfs. Exhibit 55, EPA letter of 03/29/02; Defs. Exhibit 10. |
| RR7 | Pltfs. Exhibits 51, 56 and 60; Reed Trans p. 42. |
| RR8 | Reed Trans pp. 86-88. |
| RR9 | Pltfs. Exhibit 18B, ER of 08/09/88, Field Notes, par. 17. |
| RR10 | Finch Trans p. 138. |
| RR11 | Pltfs. Exhibit 3, Field Notes of 05/01/95, p. 5; Pltfs, Exhibit 12, Field Notes of 11/16/93, p. 3. |
| RR12 | Compare information reported on Pltfs. Exhibits 9 and 10. |
| RR13 | Pltfs. Exhibit 77. |
| RR14 | Pltfs. Exhibit 78. |
| RR15 | Defs. Exhibit 41, p. 3. |
| RR16 | Pltfs. Exhibit 75, p. 5. |
| RR17 | Defs. Exhibit 4, Rule 27. |
| RR18 | Defs. Exhibits 14A and 14B. |

RR19 Defs. Exhibit 6.

RR20 Defs. Exhibit 41, letter to EPA of 11/27/76.

RR21 Defs. Exhibit 41, p. 7. Operating Permit issued 08/02/78.

RR22 Defs. Exhibit 3, Rules 25(g), 26 and 28.

RR23 Defs. Exhibit 4, Rule 8; Defs. Exhibit 5, p. 3.

RR24 Finch Trans pp. 88-90.

RR25 Defs. Exhibit 24, par. 2(b).

RR26 Defs. Exhibits 14A and 14B.

RR27 Compare Pltfs. Exhibit 35, Letter of Commitment of 09/11/95, p. 3, par. 2(g) and pars. 9-15, with Pltfs. Exhibit 68, p. 3.

RR28 Pltfs. Exhibit 12, p. 2.

RR29 Defs. Exhibit 13.

RR30 Pltfs. Exhibit 41, p. 1, Col F and Notes to Col. F; Pltfs. Exhibit 20, Utility Service Company, Inc. proposed contract.

RR31 Pltfs. Exhibit 20, Utility Service Company, Inc. proposed contract, pp. 10-11.

RR32 Pltfs. Exhibit 41, Sch PCI-Tank Maintenance and Sch. A - Tank Maintenance; Pltfs. Exhibit 20, Utility Service Company, Inc. proposed contract, p. 12.

RR33 Pltfs. Exhibit 20, Utility Service Company, Inc. proposed contract, pp. 1-3 and 6.

RR34 Pltfs. Exhibit 41, Sch PCI-Tank Maintenance and Sch. A - Tank Maintenance.

RR35 Styzen Trans p. 216.

RR36 Pltfs. Exhibit 41, pp. 2 and 3.

RR37 Pltfs. Exhibit 108.



NLU Count XI NEW LANDING UTILITY PAINT EXTERIOR OF TOWER

Water Tower

Paint Exterior

INITIAL INVESTMENT $26,000

FINCH ESTIMATE OF 8/20/88 $27,245

Adjusted to 11/16/93 (Note 1)

| Line No. | B Year | C Index (PCI) | D PCI Annual | E Annual Inflation ($) | F Initial Capital Investment | G Bank Prime Loan Rate | H Economic Benefit Before Depreciation | I Deprec. Rate | J Deprec Amount | K Base | L Marginal Income Tax Rate | M Tax Benefit From Deprec. | N Net Benefit |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 8 | 1992 | 358.2 | | | | | | | | | | | |
| 9 | 11/16/93 | 359.2 | 0.000344 | $9 | $27,245 | 0.0600 | $1,635 | 0.133333 | $448 | $27,245 | | | |
| 10 | 1994 | 368.1 | 0.024777 | $675 | $27,255 | 0.0725 | $1,976 | 0.133333 | $3,573 | $26,797 | 33.00% | $148 | $1,487 |
| 11 | 1995 | 381.1 | 0.035316 | $986 | $27,930 | 0.0678 | $2,452 | 0.133333 | $3,087 | $23,224 | 33.00% | $1,179 | $797 |
| 12 | 1996 | 381.7 | 0.001574 | $46 | $28,916 | 0.0825 | $2,386 | 0.133333 | $2,584 | $20,128 | 33.00% | $1,022 | $1,430 |
| 13 | 1997 | 388.5 | 0.012575 | $364 | $28,962 | 0.0850 | $2,462 | 0.133333 | $2,326 | $17,444 | 33.00% | $986 | $1,500 |
| 14 | 1998 | 389.5 | 0.007762 | $228 | $29,326 | 0.0850 | $2,493 | 0.133333 | $2,016 | $15,118 | 33.00% | $768 | $1,694 |
| 15 | 1999 | 390.6 | 0.002824 | $83 | $29,554 | 0.0788 | $2,329 | 0.133333 | $1,747 | $13,102 | 33.00% | $685 | $1,828 |
| 16 | 2000 | 394.1 | 0.008961 | $266 | $29,637 | 0.0950 | $2,816 | 0.133333 | $1,514 | $11,355 | 33.00% | $577 | $1,752 |
| 17 | 2001 | 394.3 | 0.000507 | $15 | $29,903 | 0.0687 | $2,054 | 0.133333 | $1,312 | $9,841 | 33.00% | $500 | $2,316 |
| 18 | 2002 | 395.6 | 0.003297 | $99 | $29,918 | 0.0475 | $1,421 | 0.133333 | $1,137 | $7,392 | 33.00% | $375 | $1,046 |
| 19 | 11/30/03 | 395.6 | 0.007856 | $99 | $30,016 | 0.0425 | $1,276 | 0.133333 | $986 | $6,406 | 33.00% | $325 | $950 |
| 20 | | | | 0 | | | | | | | | | |
| 21 | **2003 $$$** | | | | **$30,016** | | | | $20,839 | | | **$6,877** | **$16,422** |

| Note 1 | Adjusted Cost | Median Annual PCI 1993-2003: 0.008961 |
|---|---|---|
| 08/20/88 | $28,000 | |
| 01/01/89 | $26,085 | |
| 01/01/90 | $26,319 | |
| 01/01/91 | $26,585 | |
| 01/01/92 | $26,793 | |
| 01/01/93 | $27,033 | |
| 11/16/93 | $27,245 | |

APPENDIX B (5 pages)

NLU Count XI
Certified Operator
AnnualCompensation

NEW LANDING UTILITY, INC.
AFTER TAX BENEFIT
COMPOUNDED AT BANK PRIME LOAN RATE

CERTIFIED OPERATOR COST

| Line No. | B Year | C Net After Tax Cash Flow | D Bank Prime Loan Rate | E 1994 | F 1995 | G 1996 | H 1997 | I 1998 | J 1999 | K 2000 | L Total Through Feb 29, 2001 |
|---|---|---|---|---|---|---|---|---|---|---|---|
| 8 | 1993 | | | | | | | | | | |
| 9 | Jan 1, 1994 | $1,608 | 0.0725 | $1,725 | $1,876 | $2,031 | $2,203 | $2,391 | $2,579 | $2,824 | $2,855 |
| 10 | 1995 | $1,648 | 0.0878 | | $1,793 | $1,941 | $2,108 | $2,285 | $2,465 | $2,699 | $2,729 |
| 11 | 1996 | $1,706 | 0.0825 | | | $1,847 | $2,004 | $2,174 | $2,345 | $2,568 | $2,597 |
| 12 | 1997 | $1,709 | 0.0850 | | | | $1,854 | $2,012 | $2,170 | $2,377 | $2,403 |
| 13 | 1998 | $1,730 | 0.0850 | | | | | $1,877 | $2,025 | $2,217 | $2,242 |
| 14 | 1999 | $1,744 | 0.0788 | | | | | | $1,881 | $2,060 | $2,083 |
| 15 | 2000 | $1,749 | 0.0950 | | | | | | | $1,915 | $1,936 |
| 16 | Feb 28,2001 | $1,764 | 0.0111 | | | | | | | | $20 |
| 17 | | | | | | | | | | | |
| 18 | **TOTALS** | $13,658 | | $1,725 | $3,669 | $5,818 | $8,167 | $10,738 | $13,466 | $16,660 | $16,865 |

NLU Count XI
Certified Operator
Annual Compensation

NEW LANDING UTILITY

CERTIFIED OPERATOR COSTS
ANNUAL COMPENSATION. 1993 **$2,400**
**BASED ON PAYMENTS TO GERALD CARLSON:**

| Line No. | B Year | C Index (PCI) | D PCI Annual | E Annual Inflation ($) | F Recurring Cost | G Marginal Tax Rate | H Tax Amount | I Net After Tax Cash Flow | J Total Benefit Compounded At Prime Rate |
|---|---|---|---|---|---|---|---|---|---|
| 8 | 1993 | 359.2 | | | | | | | |
| 9 | Jan, 1, 1994 | 368.1 | 0.024777 | $59.46 | $2,400 | 33.00% | $792 | $1,608 | $2,855 |
| 10 | 1995 | 381.1 | 0.035316 | $86.86 | $2,459 | 33.00% | $812 | $1,648 | $2,729 |
| 11 | 1996 | 381.7 | 0.001574 | $4.01 | $2,546 | 33.00% | $840 | $1,706 | $2,597 |
| 12 | 1997 | 386.5 | 0.012575 | $32.07 | $2,550 | 33.00% | $842 | $1,709 | $2,403 |
| 13 | 1998 | 389.5 | 0.007762 | $20.04 | $2,582 | 33.00% | $852 | $1,730 | $2,242 |
| 14 | 1999 | 390.6 | 0.002824 | $7.35 | $2,602 | 33.00% | $859 | $1,744 | $2,083 |
| 15 | 2000 | 394.1 | 0.008961 | $23.39 | $2,610 | 33.00% | $861 | $1,749 | $1,936 |
| 16 | Feb. 26, 2001 | 394.3 | 0.000413 | $1.09 | $2,633 | 33.00% | $869 | $1,764 | $20 |
| 17 | | | | | | | | | |
| 18 | | | | | | | | | |
| 19 | **TOTALS** | | | | | | | $13,657 | **$16,865** |
| | | | | | | | | | ($9,050) |
| | | | | | | | | | **$7,815** |

No adjustment for partial years
Change would not be material

Addjustment for added Operator Cost: 5/01 to 1/04

| Year | Cox | Carlson | Difference |
|---|---|---|---|
| 2001 | $5,000 | $2,650 | $2,350 |
| 2002 | $6,000 | $2,650 | $3,350 |
| 2003 | $6,000 | $2,650 | $3,350 |
| | | | **$9,050** |

NLU Count XI
Water Tower
Annual Maintenance

NEW LANDING UTILITY, INC.
AFTER TAX BENEFIT
COMPOUNDED AT BANK PRIME LOAN RATE

ANNUAL WATER TOWER MAINTENANCE COST

| Line No. | B Year | C Net After Tax Cash Flow | D Bank Prime Loan Rate | E 1995 | F 1996 | G 1997 | H 1998 | I 1999 | J 2000 | K 2001 | L 2002 | M Total Through Nov. 30, 2003 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 8 | 1994 | | | | | | | | | | | |
| 9 | Jan 1, 1995 | $167 | 0.0878 | $182 | $197 | $213 | $232 | $250 | $273 | $292 | $306 | $319 |
| 10 | 1996 | $167 | 0.0825 | | $181 | $196 | $213 | $230 | $251 | $269 | $281 | $293 |
| 11 | 1997 | $171 | 0.0850 | | | $186 | $201 | $217 | $238 | $254 | $266 | $278 |
| 12 | 1998 | $173 | 0.0850 | | | | $186 | $202 | $222 | $237 | $248 | $259 |
| 13 | 1999 | $174 | 0.0788 | | | | | $188 | $206 | $220 | $230 | $240 |
| 14 | 2000 | $177 | 0.0950 | | | | | | $194 | $207 | $217 | $226 |
| 15 | 2001 | $177 | 0.0687 | | | | | | | $189 | $198 | $207 |
| 16 | 2002 | $178 | 0.0475 | | | | | | | | $8 | $9 |
| 17 | Nov. 30, 2003 | $179 | 0.0425 | | | | | | | | | $8 |
| 18 | TOTALS | $1,563 | | $182 | $377 | $595 | $833 | $1,087 | $1,384 | $1,668 | $1,756 | $1,838 |

NLU Count XI
Water Tower
Annual Maintenance

NEW LANDING UTILITY

ANNUAL MAINTENANCE OF TOWER
ANNUAL RECURRING COSTS $306
**ADJUSTED TO ELIMINATE NON-MAINTENANCE COSTS:**

| Line No. | B Year | C Index (PCI) | D PCI Annual | E Annual Inflation ($) | F Recurring Cost | G Marginal Tax Rate | H Tax Amount | I Net After Tax Cash Flow | J Total Benefit Compounded At Prime Rate |
|---|---|---|---|---|---|---|---|---|---|
| | | | | | $278 | | | | |
| 8 | 1994 | 368.1 | | | $288 | 33.00% | $121 | $167 | $319 |
| 9 | Jan. 1, 1995 | 381.1 | 0.035316 | $10.17 | $288 | 33.00% | $121 | $167 | $293 |
| 10 | 1996 | 381.7 | 0.001574 | $0.45 | $292 | 33.00% | $121 | $171 | $278 |
| 11 | 1997 | 386.5 | 0.012575 | $3.67 | $294 | 33.00% | $121 | $173 | $259 |
| 12 | 1998 | 389.5 | 0.007762 | $2.28 | $295 | 33.00% | $121 | $174 | $240 |
| 13 | 1999 | 390.6 | 0.002824 | $0.83 | $298 | 33.00% | $121 | $177 | $226 |
| 14 | 2000 | 394.1 | 0.008961 | $2.67 | $298 | 33.00% | $121 | $177 | $207 |
| 15 | 2001 | 394.3 | 0.000507 | $0.15 | $299 | 33.00% | $121 | $178 | $9 |
| 16 | 2002 | 395.6 | 0.003297 | $0.99 | $300 | 33.00% | $121 | $179 | $8 |
| 17 | Nov. 30, 2003 | 395.6 | 0.003257 | $0.98 | $300 | | | | |
| 18 | | | | | $300 | | | $1,564 | $1,839 |
| 19 | TOTALS | | | | | | | | |

No adjustment for partial years
Change would not be material